No. 89-1704 (2)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ILLINOIS HUMAN RIGHTS COMMISSION, et al.,

Petitioners,

v.

BABCOCK & WILCOX COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT, SECOND JUDICIAL DISTRICT

RESPONDENT'S BRIEF IN OPPOSITION

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June 4, 1990

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent Babcock & Wilcox Company[1] respectfully requests that this Court deny a writ of certiorari to review the judgment and opinion of the Illinois Appellate Court for the Second Judicial District, entered in the above proceeding on October 13, 1989.

[1] Babcock & Wilcox Company is a wholly-owned subsidiary of McDermott Inc., which in turn is a wholly-owned subsidiary of McDermott International Inc.

SUMMARY OF ARGUMENT

The petition should be denied because any decision by this Court would have no effect on the outcome of the case in the Illinois courts and would be an advisory opinion.

ARGUMENT

The petition presents two questions for review: (1) whether application to this case of the Illinois Human Rights Act, Ill. Rev. Stat. ch. 68, § 1-101 *et seq.*, pursuant to which the case was brought in the Illinois courts, is preempted by Section 514 of the Employee Retirement Income Security Act, 29 U.S.C. § 1144, and (2) whether, assuming it is so preempted, Section 4(f)(2) of the federal Age Discrimination in Employment Act, 29 U.S.C. § 623(f)(2), permits an employer to provide for severance benefits to all employees terminated upon a plant closure except those immediately eligible for a pension.

The petition should be denied, if for no other reason, because, were this Court to grant the petition, whichever way it decided the two questions presented would not affect the outcome of the case in the Illinois courts. This Court's Rule 10 provides a "petition for a writ of certiorari will be granted only when there are special and important reasons therefor." There is no special and important reason to review a question that will have no effect on the outcome of a case, and, understandably, this Court is not in the habit of accepting cases that are, as a consequence, of no more than academic consequence.

As for the first question—whether the state statute is preempted—if this Court were to hold that the state statute under which the case arose is preempted by federal law, that would be the end of the matter. The judgment of the Illinois courts rejecting petitioners' claim would not be disturbed. The claim was made under the state statute. If the state statute could not be applied, there would be nothing left of the case. The review exercise would have been of academic interest only and thus not the kind of matter over which this Court takes jurisdiction.

Fay v. Noia, 372 U.S. 391, 429-30 (1963) ("The federal question was moot; nothing turned on its resolution.").

If, on the other hand, this Court were to hold that the Illinois statute is not preempted, it would make no difference to the outcome of the case because the Illinois Appellate Court held that, in any event, respondent did not violate the Illinois statute, pursuant to which the case was brought and which would apply if there were no preemption, when respondent provided for severance pay except to employees immediately eligible to retire.

> "This case was initiated by a complaint filed with the Illinois Human Rights Commission by the Department of Human Rights (the Department) on behalf of certain former employees of petitioner, the Babcock & Wilcox Company (B&W). The complaint charged that B&W violated section 2-102(A) of the Illinois Human Rights Act (Ill. Rev. Stat. 1987, ch. 68, par. 2-102(A)) (Human Rights Act) by maintaining and implementing a severance pay policy which denied severance pay to complainants because they were eligible to retire on pensions, which was alleged to be an impermissible age-related criterion.
>
> * * *
>
> "On June 28, 1988, the Commission entered an order affirming the recommended order and decision, finding that B&W's severance policy was facially discriminatory, and B&W's exceptions were denied.
>
> * * *
>
> ". . .We next consider the substantive provisions of the Human Rights Act . . . as they relate to this case.
>
> "It is a civil violation under the Illinois Human Rights Act '[f]or any employer to refuse to hire, to

segregate, or to act with respect to recruitment, hiring, promotion, renewal of employment, selection for training or apprenticeship, discharge, discipline, tenure or terms, privileges or conditions of employment on the basis of unlawful discrimination.' (Ill. Rev. Stat. 1987, ch. 68, par. 2-102(A).) The Human Rights Act defines 'unlawful discrimination,' in part, as discrimination against a person because of age. (Ill. Rev. Stat. 1987, ch. 68, par. 1-103(Q).) 'Age' is defined, to the extent pertinent here, as 'the chronological age of a person who is at least 40 years old.' (Ill. Rev. Stat. 1987, ch. 68, par. 1-103(A).) Thus, only persons who are at least 40 years of age are in the protected class. There is no dispute that the claimants here are in the protected class or that B&W is an employer as defined in the Human Rights Act. The Human Rights Act also provides that an employer is not prohibited from '[a]pplying different standards of compensation, or different terms, conditions or privileges of employment pursuant to a merit or retirement system provided that such system or its administration is not used as a subterfuge for or does not have the effect of unlawful discrimination.' Ill. Rev. Stat. 1987, ch. 68, par. 2-104(5)(a).

* * *

"We too conclude that an employer need not meet a cost-justification requirement to be eligible for the exemption under section 2-104(5)(a) of the Human Rights Act, and reject the contrary conclusion of the administrative law judge and commission in the present case. Like the Federal statute, the Human Rights Act does not mandate such a rule. Further support for our conclusion is the fact that an employer's costs which are associated with providing retirement benefits do not always increase with age. *Betts*, 492 U.S. at ____ n.5, 106 L. Ed. 2d at 152 n.5, 109 S. Ct. at 2864 n.5 (in a defined contribution plan an employer's contribution is fixed and an employee will receive a level of benefits dependent on the amount

contributed; thus, an employer's cost for making contributions is totally unrelated to an employee's age).

* * *

"Given the similarities between the Age Discrimination Act and the Human Rights Act, and the Human Rights Act's similar purpose of encouraging the employment of older workers [*citation omitted*], we conclude that a retirement system in Illinois may be considered as a subterfuge for unlawful age discrimination only if the employee proves that the system was intended to discriminate in a nonfringe benefit aspect of the employment relation, which was not shown here.

"We next consider whether B&W's decision not to pay severance pay to those employees who were eligible to receive retirement pension benefits was pursuant to a retirement system and, if so, whether that system had the effect of unlawful discrimination within the meaning of section 2-104(5)(a) of the Human Rights Act (see Ill. Rev. Stat. 1987, ch. 68, par. 2-104(5)(a)). We believe that the phrase 'retirement system' must be construed here in light of the special circumstances which exist in a plant closure case. To 'retire' generally means '[t]o terminate employment or service upon reaching retirement age.' (Black's Law Dictionary 1183 (5th ed. 1979).) A 'system' is an '[o]rderly combination or arrangement, as of particulars, parts, or elements into a whole; especially such combination according to some rational principle.' (Black's Law Dictionary 1300 (5th ed. 1979).) B&W's severance-pay policies were undoubtedly part of a 'system' in that it sought to provide a source of income to all employees upon termination of its Rockford, Illinois, operation. The more difficult question is whether that system may be considered as a 'retirement system' under Section 2-104(5)(a).

"It is apparent that these complainants did not retire in the conventional sense of the word; they were in fact terminated from B&W's employ not because of their age but because B&W ceased its operations in Rockford, Illinois. But, both complainants and the other employees who did receive severance benefits were retired in the sense that both groups of employees were terminated from B&W's employ. In our view, B&W's severance policies on its closure constituted a 'retirement system' as they were designed to achieve the same result as would a traditional retirement system in the ordinary sense of that term, that is, B&W's severance policies, like a retirement plan, ensured that its employees receive a source of income upon termination from their employment. B&W's retirement policies did not have the effect of unlawful discrimination as all terminated employees received compensation from B&W by means of an age-neutral employer action. Furthermore, there is no evidence that B&W's retirement system was intended to discriminate in a nonfringe aspect of the complainants' employment relation with B&W.

"Because of our disposition of this issue, we need not consider B&W's further contention that the claims of those complainants who were hourly employees were waived by the contract entered into on March 22, 1983, between B&W, UAW and the Union.

"The summary judgment of the Human Rights Commission is reversed and the cause remanded for further proceedings consistent with this opinion.

"Reversed and remanded."

(Petition, App. 1, 2, 9, 23, 24, 26, 28-30.)

* * *

Because the Illinois courts thus acted on an independent and adequate state ground, this Court has no authority to review

their judgment. *See Fox Film Corp. v. Muller*, 296 U.S. 207 (1935); *Fay v. Noia*, 372 U.S. at 429-30, 430 n.40; *Lynch v. New York*, 293 U.S. 52 (1934); *see also Uhler v. American Federation of Labor-Congress of Industrial Organizations*, 468 U.S. 1310, 1311 (1984).

As for the second question presented by the petition – whether, if application of the Human Rights Act is preempted, Section 4(f)(2) of the federal Age Discrimination in Employment Act permits severance pay to employees except those eligible immediately to retire – this case was brought under the Illinois Human Rights Act and to enforce only that law, not the federal Age Discrimination in Employment Act (Petition, App. 2). While it is true that the Illinois Appellate Court, in interpreting the relevant provisions of the Illinois Human Rights Act, adverted to this Court's reading in *Public Employees Retirement System of Ohio v. Betts*, 492 U.S. ____, 109 S. Ct. 2854 (1989), of certain provisions of the federal Age Discrimination in Employment Act, it was the Illinois law that was at issue in the Illinois courts and the meaning of that law that was decided there. Even if this Court were to hold that Section 4(f)(2) of the federal Age Discrimination in Employment Act preempts the Illinois law, the outcome of the case decided by the Illinois courts would not be affected. The only claim made was under the state statute (Petition, App. 2). If the state law could not be applied, the case would be at an end. What petitioners are looking for from this Court is therefore an advisory opinion regarding federal law which they could then use to try to persuade the Illinois courts that they were incorrect in their interpretation of a state statute. This Court is, of course, not in the business of giving advisory opinions. *Fay v. Noia*, 372 U.S. at 429-30. It "reviews judgments, not statements in opinions." *Black v. Cutter Laboratories*, 351 U.S. 292, 297, *reh'g denied*, 352 U.S. 859 (1956). Contrary to petitioners' contention at pages 6 and 7 of their brief, no federal question under the Age Discrimination in Employment Act would survive, jurisdictionally, a ruling by this Court that application of the Illinois Human Rights Act is preempted. *See Fox Film Corp. v. Muller*, 296 U.S. 207; *Lynch v. New York*, 293 U.S. 52.

CONCLUSION

For the above reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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